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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952

No. 201

FRED SLENKER and ELIZABETH SLENKER,
Petitioners,

vs.

GRAND LODGE OF THE STATE OF ILLINOIS OF THE INDEPENDENT ORDER OF ODD FELLOWS,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

HUGH M. MATCHETT,
DAVID F. MATCHETT, JR.
WALTER F. DODD,
HUBERT L. WILL,
Chicago, Ill.

Dated: Chicago, Ill., October 27, 1952.

BARNARD & MILLER, 33 N. Market St., Chicago 6. FR anklin 2-0363

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Fred Slenker and Elizabeth Slender, respectfully pray that the Court grant a rehearing of the order entered October 13th, 1952, denying their petition for writ of certiorari to review a final order of the Supreme Court of the State of Illinois (Rec. 83) refusing to set aside an order of that court dismissing a writ of error (Rec. 38) which petitioners had sued out to review a deci-

sion (Rec. 6) of the Appellate Court of Illinois, Second District, on federal and state constitutional grounds (Rec. 300).

This petition for rehearing is filed pursuant to Rule 33.2 of this Court based on other substantial grounds available to petitioner although not previously presented. Counsel certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds herein specified.

JURISDICTION

The Supreme Court of Illinois dismissed the writ of error on January 16, 1952 (Rec. 38). Time for filing a motion to set aside the order of dismissal would have expired February 15, 1952 (Ch. 77, Sec's. 82, 83, Ill. Rev. Stat.). On February 1, 1952, petitioners filed two motions to vacate the order of dismissal (Rec. 39). On March 11, 1952, their motions were denied (Rec. 83). Time for filing a petition for writ of certiorari in this Court would normally have expired June 9, 1952. On June 6, 1952, the time was extended to and including June 23, 1952, by order of Mr. Justice Minton (Rec. 312). On June 19, 1952, the time was further extended to and including July 16, 1952, by order of Mr. Justice Douglas. On July 16, 1952, the petition was filed. After answer and reply it was denied on October 13, 1952. Time for filing this petition for rehearing will expire October 28, 1952. No adequate non-federal ground could have been the basis of decision of the Supreme Court of Illinois in dismissing the writ of error and in refusing to vacate the order of dismissal (Petition pp. 8-10). There is no jurisdictional impediment to this Court reviewing the case on writ of certiorari.

ADDITIONAL QUESTION PRESENTED

Whether the State of Illinois after granting a charter of incorporation to a private corporation expressly providing that it "shall be forever capable in law to sue and be sued in all and singular matters or demands whatsoever" (Rec. 49) (Rec. ..) may by judicial action exempt it from liability to judgment in tort on a verdict otherwise ripe for judgment without impairing the obligation of the charter-contract that it be subject to unlimited amenability to suit and thus depriving the person otherwise entitled to judgment of his personal security and property without due process of law and denying to him the equal protection of its laws in violation of his federal rights under Section 1 of the 14th Amendment.

Or, separating the precise federal question presented from the general question: Is the protection afforded by Article I Section 10 of the Constitution of the United States against a State impairing the obligations of a contract by legislative action afforded by the 14th Amendment Section 1 when a State impairs the obligations of the contract by judicial decision?

ADDITIONAL SPECIFICATION OF ERROR

That the State of Illinois after granting a charter to the Grand Lodge providing that it "shall be forever capable in law to sue and be sued in all and singular matters or demands whatsoever" (Rec. 49) (Rec. ..) could not by judicial action exempt it from liability to judgment in tort on a verdict otherwise ripe for judgment without impairing the obligation of the charter-contract that it be subject to unlimited amenability to suit and thus has deprived petitioners of their personal security and property without due process of law and denied to them the equal protec-

tion of its laws in violation of their federal rights under the 14th Amendment. (Assignment of Error before Supreme Court of Illinois, No. 16E, Rec. 206; Paragraph 12E Motion to Vacate Order Dismissing Writ of Error, Rec. 43; Suggestions In Support Of Motion IA2, Rec. 48-50).

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

A.

The State Courts in Illinois have decided a federal question of substance not heretofore determined by this Court and in a way probably not in accord with applicable decisions of this and other Federal Courts.

There are special and important reasons why review on writ of certiorari should be granted by this Court. The most important reason is that the State Courts in Illinois, by implication necessarily arising from the judgments of those courts, have decided a federal question of substance not heretofore determined by this Court in a way probably not in accord with applicable decisions of this Court. This is one of the reasons which this Court will consider in granting review on writ of certiorari (Rule 5a). Rulings made by implication necessarily arising from a judgment will be noticed by this Court. *Houston and Texas Central Rd. Co.* v. *Texas*, 177 U.S. 66, 77, 100.

The important Federal question inherent in the Additional Question Presented is this:

> "Is the protection afforded by Article I Section 10 of the Constitution of the United States against a State impairing the obligations of a contract by legislative action afforded by the 14th Amendment Section 1 when a State impairs the obligations of a contract by judicial decision?"

The question arises as follows:

Petitioners, of course, have contended from the beginning of this litigation that respondent is liable to judgment in tort. Respondent, of course, has maintained that it is not. Petitioners contend that the State of Illinois has required and the Grand Lodge has agreed that in consideration of its being granted a corporate charter with power to sue and recover a judgment that it may be sued and a judgment recovered against it in like manner and to the same extent, and that they as members of the public having a special interest in enforcement of that contract are entitled to insist that it be enforced as written when the State of Illinois by judicial decision has attempted to clothe respondent with immunity, however limited, in an action in tort to their injury in violation of the charter-contract.

The charter which the State of Illinois granted to the Grand Lodge of the State of Illinois of the Independent Order of Odd Fellows is a contract between the State of Illinois and that corporation, *University* v. *People,* 99 U.S. 309, 321-322; *Trustees of Dartmouth College* v. *Woodward,* 17 U.S. 518. It cannot be impaired by state legislation. Article 1 Section 10 Constitution of the United States; *University* v. *People,* 99 U.S. 309, 321-322; *Trustees of Dartmouth College* v. *Woodward,* 17 U.S. 518. And the construction placed on the contract is not binding on this Court which will determine for itself the meaning of the contract. *University* v. *People,* 99 U.S. 309, 323. And in making that construction this Court will apply the principles of general contract law. *Priebe & Sons* v. *United States,* 332 U.S. 407, 411; *United States* v. *Standard Rice Co., Inc.,* 323 U.S. 106, 111, and cases there cited.

The charter was introduced in evidence (Rec. 22) and was considered by the Appellate Court in rendering its opinion sustaining immunity (Rec. 7-10) completely ignoring the second section of the charter providing "that the

said corporation and their successors by the name, style and title aforesaid, shall be forever thereafter capable in law *to sue and be sued,* plead and be impleaded, answer and be answered, defend and be defended in all and any courts of justice, and before all and any judge, officers, or persons whatsoever, *in all and singular matters or demands whatsoever.*" (Italics ours). (Rec. 49) (Rec. ..). "By implication necessarily arising from the judgment" the provision quoted was construed not to render respondent liable to judgment in tort. In suing out the writ of error in the Supreme Court of Illinois petitioners assigned as error failure to hold that any immunity to judgment in tort violated the provision of the charter-contract above quoted (Assignment of Error 16E, Rec. 206), and relied on it in their motion to set aside the order of that Court dismissing the writ of error (Paragraph 12E, Rec. 43) and in their suggestions in support of that motion (IA2, Rec. 48-50). Petitioners contended that failure to enforce the charter-contract deprived them of their personal security and property without due process of law and denied them the equal protection of the law in violation of their federal rights under the 14th Amendment. "By implication necessarily arising from the judgment" the Supreme Court of Illinois held that it did not. It follows that if petitioners are right in the construction to be placed on the charter-contract provision relied upon to establish liability the Supreme Court of Illinois has held impairment of the charter-contract by judicial decision does not violate the 14th Amendment.

That Section 2 of the charter makes the respondent liable in tort is established by the decision of this Court in *Keifer & Keifer* v. *R. F. C.,* 306 U.S. 381, 392-397 in which this Court construed a provision similar to that provision. In that case this Court held when Congress launched a governmental agency into the world with authority to "sue

and be sued" that agency is not less amenable to judicial process and judgment in garnishment/because the words "sue and be sued" normally embrace all civil process incident to the commencement or continuance of legal proceedings. This Court said:

> "Reconstruction is the parent of Regional. When creating it, Congress gave Reconstruction various general powers including authority 'to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal' * * * * The legal position of Regional is * * * * the same as though Congress had expressly empowered it 'to sue and be sued' * * * * Regional claims immunity * * * * because Congress has not subjected it to suit 'in tort.' It is assumed that the present action is not one upon a contract express or implied, and, therefore, outside the purview of 'sue and be sued.' The premise is not valid, nor does the conclusion follow * * * * when it chose to do so, Congress knew well enough how to restrict its consent to suits sounding in contract. * * * * In the light of these statutes it ought not to be assumed that when Congress consented 'to suit' without qualification, the effect is the same as though it had written 'in suits on contract express or implied, in cases not sounding in tort.' * * * * There is * * * * no warrant for imparting such a distinction here."

This decision was relied on by this Court in *R. F. C.* v. *Manihan Corp.*, 312 U.S. 81, 85, in which the defendant was held liable for costs. It will be noted that the charter granted respondent is far stronger than the charter Congress granted to the R. F. C.

In *Alexander Canal Co.* v. *Swann*, 5 How. 83, this Court held that the power of a corporation to sue and be sued includes the power to take any step that an individual might take to reach a final judgment. It follows that the power to sue includes the power to reduce to judgment and that the power to be sued includes the power of another to reduce to judgment against it.

In *Hopkins* v. *Clemson Agricultural College*, 221 U.S. 636, a tort action, this Court held that the College had no immunity to suit because the statute under which it was incorporated "created an entity, a corporation, a juristic person, whose right to hold or use property was coupled with the provision that it might sue or be sued, plead and be impleaded, in its corporate name."

The Supreme Court of Kansas has apparently held that a charitable corporation created with power to "sue and be sued" was liable to judgment in a tort action by reason of that provision although it would otherwise be entitled to immunity. *McMillen* v. *Summunduwot Lodge*, 143 Kans. 502.

It is submitted that if the legislature of the State of Illinois had intended to exempt the respondent from one entire field of legal responsibility, i.e. tort liability, it would ~~not~~ have limited the power to be sued in some manner as by "except in tort" or "only in contract" rather than using the words "in all and singular matters or demands whatsoever." Can a reasonable man come to any other conclusion?

The charter provision is clearly intended to create a right in individual members of the community to sue the Grand Lodge as the need arises to enforce individual rights against the corporation. Under such circumstances they are entitled to the protection afforded by the contract as third party beneficiaries. *Filardo* v. *Foley Bros.*, 297 N.Y. 217, 225. See *Robins Dry Dock and Repair Co.* v. *Flint*, 275 U.S. 303, 307-308; *German Alliance Ins. Co.* v. *Home Water Co.*, 226 U.S. 220, 230.

The Supreme Court of Illinois has therefore held in effect that impairment of the charter-contract provision relied on by petitioners to establish liability by judicial decision does

not violate petitioners constitutional rights under the 14th Amendment. That this conclusion is not in accord with the decisions of this and other federal courts is shown by the following cases.

Township of Pine Grove v. *Talcott*, 86 U.S. 666, 678, held that a contract obligation could not be impaired by judicial decision. You said: *"That end cannot be accomplished unwarrantably no more by judicial decisions than by legislation."* (Italics ours.) And trial courts have held *"A state judicial decision can no more impair the contract in question than can a legislative act."* (Italics ours.) *Brown-Crumner Inv. Co.* v. *Town of North Miami*, 11 F. Supp. 73, 76; *U. S. ex rel. Vermont Inv. Co* v. *City of Cocoa*, 17 F. Supp. 59. It follows that impairment of a contract obligation by a state judicial decision deprives a litigant entitled to enforce the contract of his property (and where as here of judgment in tort, his right to security of person) and denies him the equal protection of the law in violation of the 14th Amendment.

A writ of certiorari should issue in this case.

B.

The chief non-federal question presented, i.e., immunity of non-governmental charity from liability for damages in tort, is one of national importance and a decision by this Court upholding petitioners' position would by charter-contract construction reduce the immunity doctrine in American Jurisprudence to one of possible exemption of trust assets from execution without interfering with the right of any State to determine its own common law policy.

Counsel feel that the non-federal question involved is of tremendous national importance and that while of course

not a basis in the absence of a federal question for allowing certiorari that importance may be properly considered by this Court as a reason for reviewing the case when as here a federal question is presented for decision. Here the non-federal question of course is the question of immunity of non-governmental charity from liability for damages in tort under circumstances where other persons would be liable to judgment.

That the question is of great national importance is shown by the cases printed at pages 1 to 28 of 25 ALR 2d, just off the press, in which immunity was denied, and the annotation at pages 29-200 covering the subject. It is particularly noted that only a few of the reported cases deal with the effect of constitutional or statutory provisions in determining tort liability of charities and that such provisions "do not afford a substantial basis for deciding either in favor or against immunity" (pp. 54-55). Apparently abandonment of the rule granting charities immunity, wholly or in part, is recommended (p. 45).

This Court has a rare opportunity to exercise a decisive influence in the right direction by solving the problem at least as far as immunity from judgment is concerned by granting certiorari, adopting petitioners' construction of the charter-contract, and upholding their contention that impairment of the charter-contract by the State of Illinois, by judicial decision, has violated the 14th Amendment of the Constitution of the United States. The decision would be decisive since almost all corporate charters contain the magic words "sue and be sued" etc. or their equivalent and the states would be compelled to follow the construction placed upon such language by this Court. It would remove the entire question of liability of charitable corporations to judgment from American jurisprudence and leave only the question of exemption of whether assets held in trust

may be taken to satisfy a judgment sounding in tort when rendered against a charity) to be determined.

The phrase "sue and be sued" is the lock and this Court is the key by which the common law of the various states may be unburdened from the lumbering baggage-wagons of old precedents granting full or limited immunity to charitable corporations (to which they feel bound by *stare-decisis*) without interfering in the slightest with the right of any state to develop its own common law policy.

The opportunity should not be missed.

C.

It is a matter of common belief among lawyers and the public that this Court in matters not involving Civil Rights has through the simple device of denying certiorari abandoned the Citizens of the United States to the whim and caprice of the State Courts in the development of the common law policy of the various States no matter how unreasonable that common law policy may be. Granting certiorari in this case would tend to destroy what counsel hope is an unwarranted belief and would act as a warning to State Courts against adopting an unreasonable common law policy.

For the reason stated in the heading certiorari should be granted in this case and review to include the questions set forth in the Petition for Writ of Certiorari as well as the Additional Question submitted in this Petition.

CONCLUSION

For the foregoing reasons this petition for rehearing should be allowed and for the reasons stated in the petition for writ of certiorari the Court should order a writ of certiorari to issue in this case.

Respectfully submitted,

HUGH M. MATCHETT,
DAVID F. MATCHETT, JR.,
WALTER F. DODD,
HUBERT L. WILL,

By .....
Walter F. Dodd,
Counsel for Petitioners.

Dated: Chicago, Ill. October 27th, 1952.

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Respondent.

Response to Petition for Rehearing.

To The Honorable Chief Justices And Associate Justices Of The Supreme Court Of The United States:

JURISDICTIONAL DEFECTS.

For reasons stated in respondent's answer to the petition for writ of certiorari, on jurisdictional aspects, it is contended that the order of October 13, 1952, denying petition for writ, is amply sustained for the reason that the

court was without jurisdiction to grant the writ under 28 U.S.C.A. 1257 (3) invoked by petitioners.

Respondent contends that the unsupported claim of petitioners that there is no jurisdictional impediment to the granting of the writ is not supported by the record and that there is nothing in their "additional question presented" which supplies the jurisdictional deficiencies pointed out in respondent's answer.

RESPONSE TO PETITIONERS' ALLEGED "ADDITIONAL QUESTION".

A. The Point urged is not available to Petitioners.

The contention that the effect of the state court decisions granting immunity to respondent nullifies certain parts of the state statute under which respondent was organized and that by reason of such holding petitioners' constitutional rights have been violated was not raised or passed upon by the trial court or the appellate court and was not in the record when the state Supreme Court denied the petition for leave to appeal from the judgment of the appellate court or when the court dismissed the petition for review by writ of error. Petitioners filed a motion in the Supreme Court of Illinois to vacate its order of January 16, 1952 dismissing the petition for writ of error and in suggestions in support of their motion, it was contended that in the light of the statutory provision, respondent should not be held immune from liability but no claim was made that the construction adopted would violate petitioners' constitutional guaranty against impairment of contract.

We do not concede that the judgments of the state courts had the effect of nullifying statutory direction but even so, the point now raised as an available additional question not previously presented has not been passed upon by the State Courts. It is not such an "additional question" as is permitted in a petition for rehearing by Rule 332.

B. Effect of State Court decisions holding respondent immune from liability.

Petitioners contend that the state court decisions grant respondent absolute immunity from liability in tort actions of every kind and that by such holding the statute which vests respondent with the power to sue and imposes the burden of being sued is nullified. The opinions assailed are not subject to such interpretation for the opinion of the appellate court limits its holding to the protection of respondent's trust funds and not to absolute immunity from all tort actions. Respondent's answer filed in the trial court set forth that it was a charitable organization and that all its services were of a charitable character. An issue was formed on such allegations and the evidence introduced by respondent showed that its funds were devoted exclusively to public charities and all its services were to further the purposes of such charities. No claim was made by petitioners in the trial that respondent had insured its trust funds so that if a judgment was obtained such funds would be protected against process issued on the judgment or that respondent had funds not devoted to the charitable trust which could be used to satisfy any judgment that might be entered. Accordingly, the only judgment that could be entered was that respondent's right to immunity had been established.

The opinion of the Appellate follows closely the opinion of the Supreme Court in *Moore* v. *Moyle,* 405 Ill. 555 and makes the distinction between an absolute immunity from being sued in any tort action and immunity which protects its trust funds from being lost by judgments entered in tort actions.

In *Moore* v. *Moyle,* 405 Ill. 555, the charitable institution had procured insurance to protect it against liability arising out of the wrongful acts of its agents and servants. In noting the distinction between an absolute immunity of a charitable institution in all tort actions brought to recover damages for the wrongful acts of its agents and servants and immunity which protected its trust funds the court said, "We are of the opinion that the exemption or immunity which has been afforded a charitable institution should go no further than to protect its trust funds from being taken to satisfy its liability for the tortious acts of its agents or servants. • • • Beyond that the rule of *respondeat superior* is in effect".

The rule announced in *Moore* v. *Moyle* and followed by the appellate court in this case, 344 Ill. App. 1, cannot be interpreted as holding that the statutory directive that it could sue and be sued has been nullified or modified by such decision.

C. Constitutional prohibitions against impairment of contract not involved.

Respondent does not concede that the decisions of the state court in this case are counter to statutory provisions, but even so, such conflict would not be a transgression of

petitioners' constitutional guarantees prohibiting impairment of contracts. They were not parties to the charter contract and had no interest in the contract which the constitutional provision protected.

For the reasons stated in the answer to the petition for writ of certiorari and in this response, the petition for rehearing should be denied.

Respectfully submitted,

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REPLY TO RESPONSE TO PETITION FOR REHEARING

To The Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

Your petitioners, Fred Slenker and Elizabeth Slenker, reply to respondent's Response to Petition for Rehearing as follows:

Reply to Claim of Jurisdictional Defects

At page 2 line 3 of the Response petitioners' statement that there is no jurisdictional impediment to the granting of the writ is characterized as an "unsupported claim." Respondent's characterization is belied by the Petition for Writ of Certiorari at pages 8 to 10, inclusive.

Reply to Respondent's Point "A"

The charter-contract was impaired by the decision of the Illinois Appellate Court: that impairment became final and irrevocable when the State of Illinois acting through its judicial department denied further review by appeal giving rise to the constitutional questions specified in the Assignment of Errors urged in support of the writ of error in the Supreme Court of Illinois. (Rec. 206.) The Assignment of Error here relied on appears as Assignment of Error No. 16E, Record 212.

In response to respondent's contention that "no claim was made that the construction adopted would violate petitioners' constitutional guaranty against impairment of contract" (Response, p. 2), respondent reads Subparagraph E out of context. Assignment of Error No. 16E is an integral part of Assignment of Error No. 16 and when read in context it is quite clear that petitioners there contended as they do here that their federal rights under the 14th Amendment had been violated by impairment of the charter-contract. Petitioners' motion in the Supreme Court of Illinois to vacate its order of January 16, 1952, restates Assignment of Error No. 16 as Paragraph 12 of that motion. (Rec. 42-45.)

Suggestion IA2 and III in support of that motion taken together spell out the constitutional question precisely (Rec. 46, 48-50, 71-80.) The attention of the Court is directed to the following statement:

> "The State of Illinois has required and the Grand Lodge of the State of Illinois of the Independent Order of Odd Fellows has agreed that in consideration of its being granted a corporate charter with power to sue and recover a judgment that it may be sued and a judgment recovered against it in the same manner and to the same extent. The plaintiffs, as members of the

> public, are third party beneficiaries of the contract. It should be enforced for their benefit." (Rec. 50.)

and the following language under Section III: "By Reason of Each of the Errors Committed by the Trial Court and Appellate Court Coupled with the Extinction of Any Possibility of Correcting Them by Appeal * * * the State of Illinois acting through Its Judicial Department Has Deprived Plaintiffs of Their Constitutional Rights" (Rec. 71-72) *i.e.*, their rights under the 14th Amendment. (Rec. 72-80.)

Reply to Respondent's Point "B"

At page 3 of the Response respondent states: "Petitioners contend that the state court decisions grant respondent absolute immunity from liability in tort actions of every kind. * * *" They make no such contention. That was respondent's contention in the trial court. The Illinois law is clearly stated at page 15 of the Petition for Writ of Certiorari.

Under *Moore* v. *Moyle*, 405 Ill. 555, petitioners are entitled to judgment but not to execution against trust funds. But petitioners have been denied their judgment in spite of *Moore* v. *Moyle* and in clear violation of the terms of the charter-contract that it "shall be forever capable in law to sue and be sued in all and singular matters or demands whatsoever." (Rec. 49.) On what grounds can the phrase quoted be qualified by implication by the words "except in tort unless covered by liability insurance or presently possessed of non-trust funds"? Obviously, petitioners have been denied due process and equal protection of the laws. The fact that immunity to judgment is limited is of no moment whatsoever. Immunity, limited or unlimited, impairs the obligations of the charter-contract and is a clear violation of the 14th Amendment. From a moral viewpoint

it is just as bad to steal a penny as it is to steal a dime, and just as bad to steal a dollar as a hundred dollar bill.

It is a particularly vicious aspect of the case that the respondent is no more a corporation organized for charitable purposes and not for profit than the New York Central Railroad or the Standard Oil Company or the Greyhound Bus Lines. They are subject to liability because they may sue and be sued by virtue of their corporate charters. How could Illinois grant such corporations immunity to judgment without violating a plaintiff's rights under the 14th Amendment? How can it do so here?

Reply to Respondent's Point "C"

The third party feature of the argument itself is worthy of consideration and determination by this Court.

Respondent begs the question. For whose benefit then was the provision that respondent "shall be forever capable in law to sue and be sued in all and singular matters or demands whatsoever" incorporated in the charter-contract? And how could an action be maintained by anyone against the corporation in the absence of such a provision either express or implied?

CONCLUSION

It is submitted that a Writ of Certiorari should issue in this case.

Respectfully submitted,

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By .....
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Dated: Chicago, Ill., Nov. 7, 1952.